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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of)
)
MARC SOBEL) WT DOCKET NO. 97-56
)
Applicant for Certain Part 90 Authorizations)
in the Los Angeles Area and Requestor Of)
Certain Finder's Preferences)
)
MARC SOBEL AND MARC SOBEL)
D/B/A AIR WAVE COMMUNICATIONS)
)
Licensees of Certain Part 90 Stations in the)
Los Angeles Area)

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: Honorable John M. Frysiak
Administrative Law Judge

**WIRELESS TELECOMMUNICATIONS BUREAU'S COMMENTS ON REPLIES TO
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Chief, Wireless Telecommunications Bureau, by his attorneys, and pursuant to the Presiding Judge's Order, FCC 97M-176 (released October 24, 1997), now offers his comments on (1) the "Reply to the Wireless Telecommunications Bureau's Proposed Findings of Fact and Conclusions of Law" filed by Marc D. Sobel (Sobel) and (2) "James A. Kay Jr.'s (Kay) Reply to Wireless Telecommunications Bureau's Proposed Findings of Fact and Conclusions of Law" filed on October 21, 1997. Consistent with the Presiding Judge's Order, these comments are limited to the misrepresentation/lack of candor issue. If the Bureau does not respond to a particular finding or argument, the lack of a response is not a concession that the matter is accurate or meritorious.

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I. INTRODUCTION

2. Sobel's and Kay's reply findings fail to address certain key evidence that Sobel misrepresented facts or lacked candor in his January 24, 1995 affidavit. While they accuse the Bureau of taking Sobel's affidavit out of context (see, e.g., Sobel Reply, p. 8 ¶14, Kay Reply, pp. 8-9), it is they who fail to put the affidavit in the proper context. When the whole record is considered, the facts compel the conclusion that Sobel attempted to deceive the Commission by making false statements in his affidavit and by failing to provide information he knew the Commission wanted -- information concerning the relationship between himself and Kay.¹

3. Kay argues that the Bureau has exceeded the scope of the designated issue by discussing matters other than Sobel's January 24, 1995 affidavit. Kay Reply, pp. 7-8. Since Kay did not object to the admission into evidence of the documents in question, Kay's objection is untimely. In fact, the purpose of discussing events prior to the January 1995 affidavits was to put the affidavits in context. Particularly with respect to the lack of candor, this evidence is helpful in determining whether Sobel intended to conceal the nature of his relationship with Kay without reviewing all of his contacts with the Commission up until January 1995. If Sobel had provided the Commission with a copy of the management agreement and the details of his relationship with Kay in December 1994, that evidence would

¹ Sobel's accusation that the Bureau is asserting baseless claims against Sobel because of Sobel's relationship with Kay (Sobel Reply, p. 2 ¶3) is itself baseless. Sobel presents absolutely no evidence for his charge. Sobel's accusation appears to be nothing more than a crude attempt to deflect attention from the evidence in this proceeding. The Bureau urges the Presiding Judge to ignore Sobel's baseless accusations and to make his decision based upon the record in this proceeding.

certainly be admissible to show that Sobel did not intend to conceal that information from the Commission. See Radio Station WABZ, Inc., 90 FCC 2d 818 ¶15 (1982). Conversely, Sobel's prior failure to disclose his relationship with Kay is relevant in determining his state of mind when he signed the affidavit. Kay's objection to the scope of the Bureau's findings must thus be rejected.

II. LACK OF CANDOR - THE CONTEXT OF THE AFFIDAVIT

4. None of Sobel's or Kay's filings in 1994 or 1995 disclosed the relationship between Sobel and Kay with respect to the Management Agreement stations. The Bureau agrees with Sobel that intent to deceive is an essential element of both misrepresentation and lack of candor. Sobel Reply, p. 3 ¶4. Sobel's claim that the Bureau "points to absolutely no fact whatsoever indicating the presence of the essential element of scienter on Sobel's part" (Id.) simply ignores the Bureau's findings which make detailed explanations as to why Sobel had an intent to deceive the Commission. See Bureau Conclusions, pp. 49-58 ¶¶88-98. Sobel fails to discuss most of the Bureau's conclusions of law, and that failure is telling.

5. An important fact in determining whether Sobel's failure to disclose his relationship with Kay constitutes a lack of candor is Sobel's knowledge that the Commission wanted to know the relationship between Sobel and Kay. Tr. 143, 151, 156. Indeed, Sobel understood as of December 1994 that his applications were being held up "due to my association with Mr. Kay." WTB Ex. 46, p. 1. While Sobel complains that he is not a lawyer and it would be unfair to require him to conclude that he should have disclosed their relationship (Sobel Reply, pp. 6-7 ¶11), he knew the Commission wanted that information. Sobel's reply also ignores the elementary principle that Commission licensees have an

affirmative obligation to inform the Commission of the facts needed in order to issue licenses in the public interest. RKO General, Inc., 670 F.2d 215, 239 (D.C. Cir. 1981).

6. Sobel's dealings with the Commission prior to January 1995 are material because they are concrete evidence of his intentions not to reveal his relationship with Kay to the Commission. In various responses to application return notices, Kay concealed his role as the billing agent for Sobel's stations was concealed (WTB Exs. 19, 21, and 23). Sobel believes he saw the responses. Tr. 238-239. Sobel's response that Kay's role was immaterial to the matters at hand (Sobel Reply, pp. 3-4 ¶6) misses the point. The decision to conceal Kay's role in billing customers on the Management Agreement stations is evidence of Kay's and Sobel's intention to conceal their relationship. Sobel can argue that Kay's role was not material to the subject of the inquiry at hand, but the fact remains that Kay took the step of concealing his role in billing customers on Sobel's stations.

7. Sobel's discussion of his failure to produce the management agreement until specifically directed to do so by the Commission in 1996 (Sobel Reply, pp. 4-5 ¶¶ 7-9) is inherently contradictory. Sobel testified that the alleged purpose of the Management Agreement was to explain the relationship between Sobel and Kay. Tr. 301. On the other hand, Sobel claims that he did not have to supply the agreement to the Commission. Sobel Reply, p. 5 ¶8. The only entity to whom the Kay-Sobel relationship would have to be explained was the Commission. Sobel could have explained their relationship by providing a copy of the agreement to the Commission. Furthermore, if the Kay-Sobel relationship was the perceived reason for delay in processing Sobel's applications, and if Sobel believed the Bureau was "confused" about the Kay-Sobel relationship (Tr. 258), and if Sobel truly believed

that his agreement with Kay fully complied with the Commission's Rules, he had every incentive to provide the agreement and any other information the Commission needed to describe their relationship. Instead, he made sweeping claims that he was an "independent" radio dealer (WTB Ex. 46, p. 1) and that Mr. Kay had no interest in any of his radio stations or licenses (WTB Exs. 41 and 43). The only plausible conclusion is that Sobel did not want to disclose the true nature of his relationship with Kay. Since Sobel knew the Commission wanted to know about his relationship with Kay, his failure to provide the agreement or any meaningful information meets Sobel's own definition of lack of candor: "the party knew that the information was relevant and intended to withhold it." Sobel Reply, p. 3 ¶4.

8. Sobel argues that if he intended to conceal his relationship with Kay from the Commission, he would not have asked for a written agreement. Sobel Reply, p. 5 ¶9. Sobel also argues that it was reasonable and credible for Sobel to believe that the agreement would be produced in the Kay proceeding. Sobel Reply, pp. 5-6 ¶9. The first argument ignores the fact that Sobel never produced the agreement until the Bureau ordered its production. The argument that Sobel expected the agreement to be produced in the Kay proceeding ignores the fact that Sobel's affidavit was being used in an attempt to remove Sobel's licenses from the Kay proceeding. If the Sobel licenses had in fact been removed from the Sobel hearing, there would have been no basis for producing the agreement. Thus, if Sobel was offering an affidavit for the purpose of removing his licenses out of the Kay hearing, he cannot have had an expectation that the agreement would be produced in the Kay proceeding. His argument is therefore internally inconsistent and disingenuous.

9. Both Sobel and Kay suggest that the management agreement did not have to be

disclosed or produced because the Bureau later made its own request to separate Sobel's licenses from the Kay hearing without referring or relying upon the management agreement. Sobel Reply, p. 9 ¶16, Kay Reply, pp. 8-9. This argument is specious. The purpose of Kay's motion was to avoid the Commission's scrutiny of the relationship between Kay and Sobel. Their argument also ignores the fact that they made misrepresentations concerning the Kay/Sobel relationship. They made the patently false claim that Kay had no interest in any of Sobel's stations or licenses. They claimed that Sobel was not an employee of Kay, although they did not mention that Sobel worked for Kay when he was working on the Management Agreement stations. Sobel understood that the relationship between himself and Kay was very relevant to the motion Kay was filing. In contrast, the Bureau's motion did not seek to avoid scrutiny of the Kay-Sobel relationship. Instead, it sought to transfer the scrutiny of that relationship to a more appropriate forum. Sobel's argument that the Bureau was somehow guilty of "lack of candor" when it did not disclose the management agreement in its request (Sobel Reply, p. 10 ¶16) is frivolous.

10. Sobel knew the Commission wanted to know about the relationship between himself and Kay. Sobel had a clear obligation to provide information concerning that relationship in his attempts to get his applications granted or to remove his licenses from the Kay hearing. Instead of providing the information he knew the Commission needed, however, Sobel deliberately withheld that information and made misleading statements concerning the relationship. Such behavior constitutes a disqualifying lack of candor and constitutes one basis for resolving the issue adversely to Sobel.

III. SPECIFIC STATEMENTS - MISREPRESENTATIONS/LACK OF CANDOR

11. In its proposed findings and conclusions, the Bureau showed that at least three specific statements in Sobel's affidavit constituted misrepresentations or demonstrated a lack of candor. Bureau Findings, pp. 35-39 ¶¶63-69, Bureau Conclusions, pp. 55-58 ¶¶95-98. Sobel claims that each of these statements was true. Sobel Reply, p. 10 ¶17. Sobel's claim cannot be accepted. In fact, his reply does not even respond to the Bureau's detailed showing of evidence.

12. Sobel's statement that Kay has no interest in any radio station or license of which Sobel is the licensee is simply false and misleading. Sobel argues that the word "interest" meant an "ownership interest" in the **licenses** (Sobel Reply, p. 10 ¶18), but this argument ignores the facts. First, the affidavit refers to both **stations** and licenses. Second, given Kay's ownership in the equipment, receipt of the monies, his ability to purchase the stations at any time for a nominal value, and his other roles in controlling these stations, it is simply a fabrication to claim that Kay had no interest in these stations or licenses. Third, Sobel admitted that Kay's receipt of money was an "interest", although he tried to deny that it was an interest "in the context" of the affidavit. Tr. 148. Perhaps most importantly, however, Kay told Sobel when Kay presented the affidavit that a "direct financial stake" in the stations was an interest:

It referred to ownership as in a partnership or ownership of stock, **as having a direct financial stake in something**. Being an owner or a stockholder or direct party to something.

Tr. 371. While Sobel refers to this quote in Paragraph 19 of his reply (at p. 11), he leaves out the portion of the quote referring to direct financial stake. Sobel admitted that Kay had a direct financial stake in the stations. Tr. 150. He therefore knew that the affidavit was false

when he signed it. His continual dissembling shows that he is not qualified to remain a Commission licensee.²

13. Similarly, Sobel's discussion of the statement that he was not an employee of Kay (Sobel Reply, pp. 11-12 ¶20) ignores the Bureau's argument. Sobel bases his argument on the distinction between an employee and an independent contractor, but the Bureau showed in its proposed findings that the Commission was entitled to know the relevant and meaningful facts that Sobel did considerable work for Kay and that Sobel worked on the Management Agreement stations as a contractor selected and paid by Kay. Bureau Conclusions, pp. 56-67 ¶97. The Commission has no regulatory interest in knowing about Sobel's status before the IRS. It did have an interest in knowing that Sobel was a contract technician selected and paid by Kay for work on stations licensed to both Kay and Sobel. Viewed in that way, Sobel's bare claim that he is not an employee of Kay was affirmatively misleading.

14. Sobel's discussion of the statement that Kay does not do business in his name and Sobel does not do business in Kay's name (Sobel Reply, pp. 12-13 ¶21) is not persuasive. This statement is inconsistent with Kay's role in operating, managing and marketing -- indeed, controlling -- Sobel's stations. The picture paints a picture of independence and separateness that does not exist. Even in his reply findings, Sobel attempts to defend indefensible statements, and he refuses to acknowledge his paramount duty to be fully candid and truthful to the Commission. He has therefore forfeited the privilege of being a Commission licensee.

² Sobel asks the Presiding Judge to speculate that Brown and Schwaninger would never have asked Kay and Sobel to sign false affidavits, and that no misrepresentation can therefore be found. Sobel Reply, p. 11 ¶19. The Bureau believes that the Presiding Judge should look at the record instead of engaging in speculation. Sobel knew that Kay had interests in Sobel's stations when he signed the affidavits, and the statement was therefore a misrepresentation.

IV. EVENTS IN 1996

15. Sobel devotes a section of his reply findings to correspondence his counsel wrote to the Commission in 1996 asking for action on his applications and complaining about the Bureau's failure to take action on his pending matters. Sobel Reply, pp. 13-16 ¶¶23-27. The 1996 communications are not relevant to the designated issues. The designated misrepresentation issue requires an inquiry into Sobel's state of mind in January 1995, when he signed the affidavits. Events that occurred over a year later simply have no bearing on the designated issues. Memorandum Opinion and Order, FCC 97M-57 (released April 17, 1997) at ¶4. While the Presiding Judge received Sobel Exhibit 6 subject to the exhibit being connected to the issues (Tr. 66), Sobel made no such connection. Moreover, even if the matters were somehow relevant, a reading of the documents shows that Sobel was much more interested in getting his applications granted than in providing the information the Commission needed to determine his qualifications.³

V. CONCLUSION

16. Sobel knew the Commission wanted to know about the relationship between himself and Kay. Instead of providing that information, however, he provided affidavits which he knew contained false statements and drew a misleading picture of their relationship. Moreover, Sobel refuses to acknowledge his duty to affirmatively provide the information the Commission needs to license him in the public interest. Accordingly, the misrepresentation

³ Sobel claims that in his December 1994 letter to Gary Stanford (WTB Ex. 46), he "volunteered to provide additional information to the Commission upon request." Sobel Reply, p. 13 ¶23. The letter contains no such statement. The request that Mr. Stanford call Sobel if he needs "further assistance" is not an offer to provide additional information.

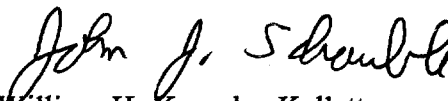
and lack of candor issue must be resolved adversely to Sobel, and Sobel is not qualified to remain a Commission licensee. Accordingly, the Bureau asks the Presiding Judge to revoke Sobel's licenses, deny his pending applications and dismiss his pending finders' preference requests for the reasons stated herein and in its proposed findings and reply findings.

Respectfully submitted,

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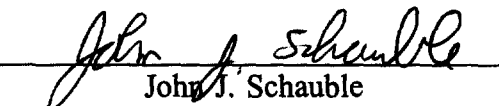
CERTIFICATE OF SERVICE

I, John J. Schauble, an attorney in the Enforcement and Consumer Information Division, Wireless Telecommunications Bureau, certify that I have, on this 31st day of October, 1997, sent by first-class mail, copies of the foregoing "Wireless Telecommunications Bureau's Reply to Proposed Findings of Fact and Conclusions of Law" to:

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